Punishment and rights in European Union citizenship

Punishment and Rights in European Union Citizenship: Persons or Criminals?

Abstract

While European Union (EU) citizenship has been traditionally key to limiting criminalisation at national level, over recent years crime has become a criterion to distinguish between the good and the bad citizen, and to allocate rights according to that distinction. This approach has been upheld by the EU Court of Justice in its case-law, where crimes show the offender disregard for the societal values of the host Member States, and deny her integration therein. This article argues that citizenship serve to legitimate criminal law. The Court outlines two – counter-posing - types of human being: *the law-abiding citizen* and *the criminal*. On that ground, the CJEU delineates a model of probationary citizenship directed towards the protection of the former category from the latter. The article shows the legal unsoundness of the Court's approach. It does so by analysing and locating the case-law over a crime-citizenship spectrum, marked at its opposite ends by Duff's communitarian approach to criminal law, on the one hand, and Jakobs' criminal law of the enemy, on the other.

1. Introduction

Over the last years, the debate on rights and duties in European Union (EU) citizenship has fiercely revamped.[1] The outburst of the economic crisis has brought about a manifold and widespread attitude of closure and wariness, on part of Member of States, towards non-nationals. Scholars have identified continuity of such evolution in a wider trend of un-freedomisation that started especially as a reaction to 11 September.[2]

In this context, thorny questions have arisen as to what to make of foreigners – and in particular Union citizens – that have committed a crime in the Member State where they are based.

Union law has seen crime and criminal convictions slowly emerging as a criterion to allocate (or deny) rights and distinguish between the *good* and the *bad* citizen. A number of cases have been brought to the attention of the EU Court of Justice ('CJEU' or 'the Court'). In these decisions, the Court regarded wrongdoings as a signifier of the offender's disregard for societal values and lack of integration. Such an approach explicitly looks at integration as a requirement for granting citizenship rights; integration which is, in turn, denied per se by criminal behaviour.

Thereby, crime has become a sufficient reason on its own to deny citizenship rights (mainly, right to residence and protection against the expulsion). Scholars have referred to such a strongly value-based argumentative patter as a *normative turn* in the Union discourse.[3] Along similar lines, Stephen Coutts

1 R. Bellamy, 'A Duty-Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights', *European Law Review* 21, no. 4 (2015): 558–65; D. Kochenov, 'EU Citizenship without Duties', *European Law Journal* 20, no. 4 (2014): 482–98; Niamh Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship', *Common Market Law Review* 52, no. 4 (2015): 889–937.

2 C. Gearty, 'The State of Freedom in Europe', (21) 6 (2015) *European Law Journal*, pp. 706–721.

3 S. Barbou des Places, 'The Integrated Person in EU Law' in L. Azoulai, S. Barbou des Places, E. Pataut, eds., *Constructing the Person in EU Law. Rights, Roles, Identities* (Oxford: Hart Publishing, 2016), 186 onwards.

has traced back the Court's decisions to a retributive stance, and in particular to Anthony Duff's communitarian approach to criminal law.[4] The CJEU's application of the latter approach to cases of Union citizenship would be directed toward the establishment of a community of values within the EU. The CJEU would be using criminal law and public security to strengthen 'the substance of Union citizenship by complementing the rights of the Directive with correlative obligations'.[5]

This paper challenges that vision, and argues that the Luxembourg judges point to the opposite direction. It is submitted that the Court resorts to citizenship to strengthen the legitimacy of (in particular, EU) criminal law. It does so by outlining a model of probationary citizenship, built upon presumptive mechanisms and the use of abstract category such as 'crime' and '*the* criminal'. With the protection of *the law-abiding citizen* from *the dangerous individual* in mind – embodied by a broad interpretation of *public security* - the Court allocates or restrict rights on the basis of individuals' criminal record.

Therefore, the article analyses the Court's case-law beyond the logic of rights restriction or obligation imposed. It offers a different perspective to the existing debate, by revealing a paradigmatic shift in the Court's approach. To do so, the rulings are not merely understood and assessed as cases on the limits on citizenship rights. Rather, the approach of this research brings to the fore the deeper understanding of the role for criminal law and the criminal embraced by the CJEU. Furthermore, it connects this evolution to a broader redefinition of the Court's understanding of citizenship, where anthropological models are opposed and divided by the very thin line of integration: the economically active, the law-abiding, on the one hand; the unemployed, the criminal, on the other.

In order to test the hypothesis, the article discusses the case-law of the CJEU on crime and citizenship following the *Tsakouridis* judgment through the lens of punishment theory.[6] The materials have been selected by researching rulings including both the terms 'crime', or 'criminal law', *and* 'citizenship', through the database of the CJEU. Then the analysis focused on cases where the Court had to decide whether or not conferring EU citizenship rights upon a person with criminal record. As a result, the materials mainly revolve around interpretation of Treaty provisions on EU citizenship, such as Articles 18 and 21 Treaty on the Functioning of the EU (TFEU), and Directive 2004/38/EC (or 'Citizenship Directive').[7]

The article focuses on the decisions issued following the *Tsakouridis* case, the latter constituting a turning point in the Court's approach to crime and citizenship. Historically, free movement of goods[8] and persons[9] has been key to limiting over-criminalisation at national level and expanding individual

4 Stephen Coutts, 'Union Citizenship as Probationary Citizenship: "Onuekwere"', *Common Market Law Review* 52, no. 2 (2015): 531–45.

5 L. Azoulai and S. Coutts, 'Restricting Union Citizens' Residence Rights on Grounds of Public Security. Where Union Citizenship and the AFSJ Meet: P.I.', *Common Market Law Review* 50, no. 2 (2013): 553–70; Kochenov and Pirker, 'Deporting the Citizens within the European Union', 569.

6 Case C-145/09 *Tsakouridis* [2010] I-11979.

7 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004L 158/ 77.

8 Case C- 41-76, *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs* [1976] ECR 01921; Case C-299/86, *criminal proceedings against Rainer Drexl* [1988] ECR 01213; Case C-276/91, *Commission of the European Communities v French Republic* [1993] ECR I-04413; Case C-95/01, *criminal proceedings against John Greenham and Léonard Abel*, [2004] ECR I-01333.

9 Case C-193/94, *criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] ECR I-00929; Case C-16/78, *criminal proceedings against Michel Choquet* [1978] ECR 2293, para 4; Case C-265/88 *criminal proceedings against Lothar Messner* [1989] ECR 4209, para 14; Case C-243/01, *criminal proceedings against Piergiorgio Gambelli and*

rights.[10] Granted, this has not excluded restrictions based on public policy[11] or public security.[12] However, the case-law of the CJEU over the years has played a major role in setting limits to those restrictions[13] in a way that has been largely translated into the Citizenship Directive. Starting with *Tsakouridis*, the Court's understanding of the relationship between criminal conducts and citizenship has radically changed, with public security often being resorted to as a tool to justify serious restrictions of individual rights.

With the view to understanding and discussing the decisive rationale underpinning the CJEU's stance on the use of criminal law within the EU, the materials are discussed through the lens of punishment theory. Strictly understood, the Court judgments are not properly concerned with criminal punishment, but with the denial of rights following criminal convictions. However, the discussed rulings are traced back to punishment theory by a holistic understanding of punishment. In particular, the article relies on Dolinko's approach, according to which the core practice of punishment can be regarded as 'the imposition of consequences generally believed to be painful or burdensome on someone found to have violated the law, as a condemnatory response to that violation, by person vested with legal authority to impose these consequences'.[14]

With that in mind, the article places the Court's case-law within the broader context of the purposes of punishment recognised in the law and constitutional traditions of member states, and the EU itself: general deterrence, specific deterrence (incapacitation and, especially, reintegration), retribution. While general deterrence is not decisive to the present discussion, the analysis focuses on specific deterrence and retribution.

The assessment of the case-law is carried out by envisaging the relationship between crime and citizenship rights as a spectrum (hereinafter 'crime-citizenship spectrum') consisting of different approaches: at its ends, the articles poses the communitarian, inclusive account of Duff, and the Jakobs' distinction between the criminal law of the citizen and the criminal of the enemy, respectively. Upon marking the boundaries of the spectrum, such theoretical frameworks are not regarded as sole and mutually exclusive alternatives. Quite the contrary, they are used to locate the Court's stance over such a spectrum – where retribution is just one of the possible purposes of criminal penalties - and identify shortcomings in the CJEU's case-law.

Others [2003] ECR I-13031; Joined cases C-338/04, C-359/04 and C-360/04, *criminal proceedings against Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio* [2007] ECR I-01891; Case C-5/83, *criminal proceedings against H.G. Rienks.* [1983] ECR 4233; Case C-186/87, *Ian William Cowan v Trésor public*, [1989] ECR 00195.

10 As for pre-Maastricht citizenship, see in particular D. Kochenov and Sir R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text', *European Law Review* 37, no. 4 (2012).

11 Case 41-74, *Yvonne van Duyn v Home Office*, [1974] ECR 01337; Case C-34/79, *Regina v Maurice Donald Henn and John Frederick Ernest Darby* [1979] ECR 03795; Case C-137/09, *Marc Michel Josemans v Burgemeester van Maastricht* [2010] ECR I-13019

12 Case C-83/94, c*riminal proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer* [1995] ECR I-03231.

13 See among many Case C-36/75, *Roland Rutili v Ministre de l'intérieur*, [1975] ECR 01219; Case C-348/96, *criminal proceedings against Donatella Calfa.* [1999] ECR I-11; Case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State*, [2002] ECR I-06591; *Joined cases Georgios Orfanopoulos and Others* (C-482/01) and *Raffaele Oliveri* (C-493/01) *v Land Baden-Württemberg*, [2004] ECR I-05257.

14 Dolinko, *Punishment*, 405. The account has its starting point the Hart's approach, supplemented by the reprobation element put forward by Feinberg. See Hart, Ibid, 5; J. Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970).

The article shows the following. Firstly, the Court overlook the drawbacks that expulsion measures – and denial of rights broadly – could have on the reintegration of the person concerned. This is so despite its tentative references to the importance of taking into account the reintegration purposes of custodial penalties. Secondly, and relatedly, the oblivescence of the reintegration purpose patently denies the Court's communitarian approach to criminal law. Rather, it is submitted that the Court envisages a model of probationary citizenship, where the strong stress on security causes a steer towards an understanding of *the* criminal as a threat. As shown below, allocating rights according to the anthropological divide *citizen* v *criminal* can prove contradictory and unrealistic, so making EU citizenship significantly weaker. Thirdly, it highlights the strong link emerging between EU citizenship and EU criminal law, with the former being used to legitimate Union's competences in the latter area.

The article is structured as follows. In Section 2, the methodology (2.1.) and the materials (2.2.) are discussed. Firstly, the broader approach to European integration in criminal law and citizenship is briefly introduced (2.1.1.). Secondly, the focus moves on to retributivist theories of criminal law - and Duff's communitarian approach in particular - on the one hand (2.1.2), and Jakobs' distinction between criminal law of the citizen and criminal law of the enemy, on the other (2.1.3.). Thirdly, the main scenario of this research (Court's case-law on crime and citizenship rights) is explained and justified (2.2.).

Section 3 deals with the research results and the discussion. After presenting the judgments relevant to this paper (3.1.), the Court's approach is placed at a point over the spectrum more leaning towards the Jakobs' account (3.2.). *Leaning towards* must not be understood as *overlapping with* the criminal law of the enemy, as the latter often finds expression through preventive measures.

The conclusions (4) confirm the main hypothesis of the article: in spite of the – apparently – morals-centred approach, the Court understanding of the relationship between crime and citizenship is mainly concerned with security and legitimacy of EU criminal law, built upon an understanding of *the* criminal as a threat. The discussion shows that the CJEU's stance is hardly compatible with EU citizenship law, and carries the seeds of an authoritarian view of the wrongdoer.

2. Connecting the Dots. EU Citizenship and Crime

2.1. *The Theoretical Framework*

2.1.1. European Integration in Citizenship

The crime-citizenship spectrum is to be placed in the broader framework of EU citizenship. The legal approach usually regards citizenship as a combination of two elements.[15] On the one hand citizenship

15 D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship And The Difficult Relationship Between Status And Rights', *Columbia Journal of European Law* 15, no. 2 (2009).

as a status, linking the state to its citizens. On the other, citizenship as bearer of a complex of rights enjoyed by citizens.[16]

As know, the very core of EU citizenship is the right, for Union nationals, to move and reside freely within the EU regardless of their nationality,[17] and without requiring links to the performance of an economic activity.[18] The Citizenship Directive gives substance to this right mainly through residence security, namely the right to enter and stay permanently in the territory of another member state.[19] The Directive does so by regarding the right to residence and the protection against expulsion as means of, rather than (only) a reward for, integration. Secondly, with specific regard to the use of coercive measures: they cannot be triggered only by criminal record; they require a case-by-case assessment of the seriousness of the threat embodied by the person concerned.[20] While these principles are stated in the specific context of expulsion from the host state,[21] they convey the idea of EU citizenship as sitting at odds with abstract categories without any anchors to reality.

The Court's case-law on rights and crime relationship discussed here is part of a broader trend. As in other controversial areas – such as equal treatment in access to social benefits – the Court has redefined its traditional approach to the relationship between citizenship rights, on the one hand, and limits and conditions, on the other. As conditions and limits are reversed as instances of obligations or responsibility,[22] personal integration - resting on quantitative, territorial *and* qualitative elements – into the host society emerges as the overriding duty and the decisive criterion for allocating rights. By subjecting the acquisition and maintaining of rights to a never-ending integration test, the Court outlines a model of probationary citizenship where ideal types of individuals are opposed and divided by a thin line: on the one hand the good, economically active, law-abiding citizen; on the other, the bad, unemployed, wrongdoer.

Equal access to social benefits in the host state is a case in point for the emergence of these counter-posed characters in the new EU citizenship narrative: the self-sufficient v the economically inactive. In *Dano*, the Court found that non-discrimination applies only if the person's residence in the territory of the host Member State complies with the conditions of the Citizenship Directive – namely, being

16 However Ibid., the author found that the relationship between status and rights may be flexible, and another distinction is possible to be drawn between " 'formal' citizenship, resting on the status, and 'informal' citizenship, emphasising the importance of the possibility of enjoying citizenship rights as opposed to the importance of possessing the formal legal status of a citizen".

17 Case C-224/98, *D'Hoop,* [2002] ECR 6191, para 28; Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, para 31; Case C-138/02, *Collins,* [2004] ECR I-2703, para 61 onwards.

18 A link established by the Court of Justice, and currently codified in Articles 18, 20 and 21 of the TFEU . See Case C-76/05, *Schwarz* [2007] ECR I-6849, para 89; *Grzelczyk*, para 36-37; Case C-413/99, *Baumbast*, [2002] ECR I-7091, para 81. See also J. Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', *EUI Working Papers RSCAS 2010/60*, 2010, 9 onwards.

19 As Kochenov argued, 'Residence security is at the core of what the essential legal essence of the citizenship status is now about', which also explains why (even the mere possibility of) being deported and expelled 'play(s) an essential role in outlining with clarity the scope of those who are citizens of a polity, as opposed to merely residents'. D. Kochenov and B. Pirker, 'Deporting the Citizens within the European Union: A Counter-Intuitive Trend in Case C-348/09, PI V Oberburgermeisterin Der Stadt Remscheid', Colum. J. Eur. L. 19, no. 2 (2012): 369. For a brilliant analysis of EU citizenship and the territory, see Loïc Azoulai, 'The (mis) Construction of the European Individual: Two Essays on Union Citizenship Law', *EUI Department of Law Research Paper*, no. 2014/14 (2014).

20 Article 27(2).

21 Article 28(2) stipulates that those Union citizens (or their family members) who have the right of permanent residence in the host Member State, may be subject to an expulsion measure so long as there are serious grounds of public policy or public security. Article 28(3)(a), precludes the expulsion of Union citizens who have resided in the host Member State for the previous ten years, unless imperative grounds of public security, as defined by Member States and subject to compliance with EU law, justify the measure.

22 Nic Shuibhne, 'Limits Rising, Duties Ascending', 900 onwards.

economically active or self-sufficient.[23] In *Alimanovic*, this process of abstraction is further strengthened. As the Directive establishes 'a gradual system as regards the retention of the status of worker which seeks to safeguard the right of residence and access to social assistance', the need for an individual assessment of the specific circumstances of the person concerned is dismissed.[24] Consistently with its approach on crime and citizenship rights, the Court 'shift[s] away from equal rights as a means for integration, towards an output-oriented assessment that links citizens' rights to the degree of integration'.[25]

The new approach of the Court is based on a high level of abstraction, whereby the depiction of anthropological models of citizens is combined to the refusal to apply any proportional test.

The residence-worthiness test is the barycentre of the Court's new understanding, based on factors such as the level of income or loyalty to the law. To this end, the commission of criminal conducts raise thorny questions: above all, is the wrongdoing – and, if so, to what extent - capable of affecting the personal integration link between the offender and the host state? This process of departure from the wording and the rationale of citizenship law is strengthened by the construction of a broad concept of *public security* through the identification of dangerous categories of individual.

In next two paragraphs, the paper presents the two main approaches used to analyse the Court's stance, and places them in the context of the relationship between crime and EU citizenship.

2.1.2. Retribution and Duff's Communitarism

Consequentialism and retributivism constitute the two main approaches to punishment theory.[26] On the one hand, consequentialist accounts justify punishment by its (desirable) consequences:[27] normative validation and deterrence,[28] be it general (deterring others from committing crimes) or specific (deterring individuals from reoffending through incapacitation or rehabilitation).[29] On the other, retributivism[30] sees punishment as an intrinsically good response to criminal behaviour, and seeks the

23 Case C‑333/13, *Dano*, para 69.

24 Case C-67/14, *Alimanovic*, paras 59-60.

25 D. Thym, 'The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens', *Common Market Law Review*, 2015, 52(1), 39.

26 However, authors argued that "The labels 'consequentialist' and 'retributive' are of increasingly little use as the theories that they are meant to group together have become so diverse." M. Matravers, *Justice and Punishment* (Oxford: Oxford University Press, 2000): 4.

27 As foundational works for consequentialist accounts, see C. Beccaria, *Dei delitti e delle pene* (Milano, Feltrinelli, 2014) and J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Birmingham: Legal Classic Library, 1986). Even the term 'consequentialism' can be approached from more than one perspective. It was firstly introduced by G. E. M. Anscombe, 'Modern Moral Philosphy', *Philosophy* 33, no. 124 (1958): 12. On the one hand, it has been used interchangeably with utilitarianism. On the other, utilitarianism refers to one particular variety of consequentialism..

28 Dolinko, 'Punishment', 406.

29 M. C. Materni, 'Criminal Punishment and the Pursuit of Justice', *British Journal of American Legal Studies* 2 (2013): 290 onwards. See J. Andenas, 'The General Preventive Effects of Punishment', *University of Pennsylvania Law Review* 114, no. 7 (1966): 949. Broadly, one can see how rehabilitation is meant 'to reintegrate the offender into society after a period of punishment', whereas incapacitation takes place by locking up the allegedly dangerous individual up. See B. Hudson, *Understanding Justice* (Buckingham: Open University Press, 2003), 26; See A. M. Dershowitz, 'Background Paper', in *Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing* (New York: McGraw-Hill, 1976).

30 J. M. Cottingham, 'Varieties of Retribution', Philosophical Quarterly 29, no. 116 (1979): 238–246. These can go from the unfair advantage that the offender would derive from the crime, M. Davis To Make the Punishment Fit the Crime, (Boulder: Westview, 1992); to the need for 'teaching the wrongdoer that the action she did […] is morally wrong, J. Hampton, 'The Moral Education Theory of Punishment', Phil. & Pub. Affairs 13, no. 3 (1984): 208–238; for permitting 'purgation of guilt', H. Morris, 'A Paternalistic Theory of Punishment', American Philosophical Quarterly 18, no.4 (1981): 263–271; or, for respecting and addressing the criminal as a rational moral agent seeking 'his participation', R. A. Duff, Trials and Punishments (Cambridge: Cambridge University Press, 1986).

punishment that the society has a right to inflict and the criminal a right to demand.[31] Its goal is not mere deterrence, but providing actual and potential offenders with moral reasons for freely choosing not to offend.

Mixed approaches to punishment are espoused by member states of the Union, where reintegration is part and parcel of their constitutional traditions and balance the retribution inherent in the imposition of criminal penalties.[32] The same goes for different authors, who have tried over to outline theories including elements of both retributivism and consequentialism.

Duff's account is a paradigmatic example in this respect, as he conceives of punishment as a way to bring the offender 'to repent his crime; to accept his punishment as an appropriate vehicle for his repentance; and thus to *reform* himself' (emphasis added).[33] Criminal law has the function to select what wrongs should be 'public', so making the author publicly accountable. Therefore, 'criminal law is focused on the polity's formal response to the conducts with which it deals with'[34]. The legitimacy of criminal law relies on the existence of an inclusive political community,[35] which should deal collectively with the wrong in order to 'preserve rather than deny the offender's civic standing'. He looks at a model of republican citizenship, 'understood as equal and mutually respectful participation in the civic enterprise'[36], without being used as a tool to distinguish the *law-abiding* from the *enemy*. Against that background, criminal law should not be oriented to incapacitation. Non-citizens are not disregarded in Duff's approach to punishment: temporary visitors or residents should be accorded 'the respect and concern that is due to guests who are both bound and protected by the values that define the polity'.[37]

Duff has explicitly the state community in mind,[38] so that a transposition of his account as it is to the Union level would be inaccurate. The main reason is that the homogeneity of the EU as community of values is inferior to that of member states. A Union-wide Duffian approach to citizenship and criminal law would see the latter as a means of (re)inclusion of the person in the society where s/he lives. The 'collectively dealing with the wrong' is not – only - cooperation between authorities to coercively move the offender from one state to the other; or, in other words, allowing the *host* state get rid of the source of disturbance. Quite the contrary, making a person publicly accountable for his/her behaviour means, for a state, taking charge of that person, and reaffirming his/her existence as part of that community.

Furthermore, a Duffian approach would reject any counter-position between abstract models of human being (*the citizen* v *the criminal*), as well as automatisms between offences and rights restriction. Since

31 J. G. Murphy, 'Retributivism and the State's Interest in Punishment', *Nomos* 27 (1985): 158-9.

32 While general deterrence is usually associated to and pursued through the abstract threat of penalty established by the law, reintegration and retribution are particularly relevant to the present discussion. For an analysis of the controversial use of reintegration at EU law level, see L. Mancano, 'The Place for Prisoners in EU Law?', *European Public Law*, 22, no. 4 (2016): 717-747.

33 See Dolinko, *Punishment*, 421. A. Duff, *Trials and Punishment* (Cambridge: Cambridge University Press, 1986) 260.

34 Duff, 'Responsibility, Citizenship, and Criminal Law'.

35 'Since the criminal law is part of the apparatus of the state, […] the criminal law's community must be a polity'. Duff, 'Responsibility, Citizenship, and Criminal Law', 138.

36 Duff, 'A Criminal Law for Citizens', 300 onwards.

37 Duff also refers to *responsible citizen*, where the wrongdoer 'answers to his fellow members of the community for his alleged breaches of that law'. See R. A. Duff, 'Law, Language and Community: Some Preconditions of Criminal Liability', *Oxford Journal of Legal Studies* 18, no. 2 (June 1998): 189–206.

38 R. A. Duff, 'A Criminal Law for Citizens', *Theoretical Criminology* 14, no. 3 (1 August 2010): 293–309.

the punishment against the wrongdoer is underpinned by an underlying political community, the response to the unlawful conduct cannot only result in doing away with the person in *one* state.

The traditional understanding of EU citizenship and crime is not one where the offender is – nearly - automatically refused or withdrawn rights, and physically removed from the territory of the *host* state. However, when the Court states – as it does in one of the cases discussed below - that the commission of a crime denies integration *tout court*, it is depersonalising the citizen. It is turning the person who has committed a crime into the criminal. If crime precludes integration, in certain cases it erases the integration link already established. The detrimental effect on reintegration caused by expulsion, denial or withdrawal of rights, is not relevant: in the absence of integration (denied by the offence), there is no reintegration to purse. The *host* states are places where non-nationals (but still EU citizens) are living oxymora: they are perpetually temporary visitor.

2.1.3. The Criminal Law of the Enemy and Citizenship Rights

Duff's account can be placed at the end of the crime-citizenship spectrum, where citizenship underpins an inclusive understanding of criminal law - the 'dealing collectively with the wrong'. At the other end, one finds the Jakobs' distinction between the criminal law of the citizen and the criminal law of the enemy.

According to Jakobs,[39] criminal law and punishment have a fundamental communicative function: guaranteeing normative expectations of the society. Punishment communicates that that conduct is prohibited, and reaffirms that the violated rule is still valid. The citizens' criminal law communicates that that conduct is not permitted. In spite of the wrongdoing, the individual is still regarded as a person. The enemy criminal law addresses who can be no longer considered a law-abiding citizen, but rather a threat to society. It looks at particular areas of crime (sexual offences, drug trafficking, terrorism) and takes mainly the form of preventive measures, high imprisonment terms, diluted procedural rights.

Jakobs firmly states that citizens' criminal law must be kept separately from enemy criminal law, so upholding the sharp contrast between the loyal citizen, on the one hand, and the deviant enemy, on the other. This nonetheless, scholars found that 'To the extent that the State uses enemy criminal law to secure citizen criminal law it risks the whole existence of the latter'.[40]

Jakobs' distinction has been associated to the model of probationary citizenship, where such a status is used as a means to the end of reaffirming national security.[41] Zedner noted that 'Citizenship is asserted […] as central to the policing of those irregular citizens who, though already resident, are deemed to stand outside civil society'.[42] The probationary citizenship amounts to a perpetual 'Damocle's sword',

39 Its background can be traced back to the Luhmann's theory of social system, according to which the complexity of modern society requires a high level of trust. Luhmann, *La Fiducia*.

40 Carlos Gómez-Jara Díez, Ibid, 533.

41 Lucia Zedner, 'Security, the State, and the Citizen: The Changing Architecture of Crime Control', *New Criminal Law Review* 13, no. 2 (2010): 379–403.

42 This includes, amongst other things, harsher and longer penalties, and a legally established presumption between their conduct and expulsive measures.

hanging on the head of the *visitors*, as well as the citizen: it works as a reward, rather than a tool of political integration.

Symptoms of this approach have emerged in EU law over the years. The tendency to counterpose the law-abiding citizen to the criminal[43] is accompanied by the demands for protection of the former class of individuals and the public more in general, as well as by war declarations against serious areas of crime (most commonly drugs, sexual offenses, and terrorism).[44] The tendency in EU substantive criminal law to go 'to war at crimes' has been identified as part and parcel of the EU legislature at large.[45] This is reflected in policy documents such as the Tampere Council, where the application of mutual recognition to criminal law is linked to the *safe* exercise of free movement by Union citizens. In secondary EU law, the FDs on (1) the transfer of prisoners and (2) the mutual recognition of probation measures establish a system of transfer of the convicted person from the state where they have been convicted to the one where they have higher chances of reintegration. The former instrument removes the consent of the person to the transfer in a number of cases, one being that s/he was delivered an expulsion measure in the state from which s/he will be transferred. The latter sees the protection of the public as one of its key objectives. There is then a clearly super-individual dimension of reintegration, where the person is somehow regarded as an objective for the purposes of public security. The role for the individual is shrunk proportionately to the presence of signs of dangerousness: an expulsion measure removes the need for consent of the individual to the transfer.

How does this relate to the relationship between crime and EU citizenship rights? The Court's understanding departs from the establishment of a community of values through criminal law, and builds a probationary citizenship upon the following centrepieces. The centre of gravity is an enlarged and debatable concept of public security, mainly construed through categorisation of dangerous individuals. The Court identified groups of people (sexual offenders, drug dealers, terrorists) that are per se a threat to public safety, and are therefore worth being expelled by the host member state – or the Union at large. We see therefore an inverse correlation between the reduced role for individual assessment, on the one hand, and the increased level of abstraction, on the other. This conceptual apparatus is used to allow member states deny EU citizens protection against the expulsion, as recognised in the Citizenship Directive.

However, such dynamic takes place on a larger scale as well, where the broader issue of crime and citizenship rights is at stake. *Crime* as such denies integration and shows disregard for societal values of the host society. Two abstract categories of human beings are counter-posed (the criminal and the law-abiding); individuals are placed in either of them, and rewarded with or denied rights accordingly, depending on their level of obedience to the law. What is more, the Court tries to corroborate the

43 R. A. Duff, 'Inclusion and Exclusion: Citizens, Subjects and Outlaws', *Current Legal Problems* 51, no. 1 (1998): 241–66.

44 D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press), 163–165; J. Simon, *Governing Through Crime. How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2007), 264–272.

45 Carlos Gómez-Jara Díez, 'Enemy Combatants Versus Enemy Criminal Law: An Introduction to the European Debate Regarding Enemy Criminal Law and Its Relevance to the Anglo-American Discussion on the Legal Status of Unlawful Enemy Combatants', *New Criminal Law Review: An International and Interdisciplinary Journal* 11, no. 4 (2008): 558.

equation by reference to EU criminal law. The fact that the fight against certain crimes is covered by primary and secondary EU law further legitimates a restrictive approach.

Against the background, the collectively dealing with the wrong is out of the picture. The AG refers to reintegration as a general principle of EU law, though from a super-individual perspective: since these persons will come back to society one day, reintegration is key to the fight against crime. Reintegration, however, is very tentatively part of the Court's vocabulary. What about the detrimental impact of expulsion from the state where the person has been living for over 10 years? The Court seems not to be particularly concerned: regardless of the time they have spent in the *host* member state, these persons are, and remain, *guests* on trial.

2.2. Introduction of the Scenario

This research discusses the Court's stance on crime and citizenship rights. The main argument is that the CJEU's approach leans towards a model of probationary citizenship, which resembles in some features Jakobs' distinction between the criminal law of the citizen and the criminal law of the enemy. The research analyses the Court's rulings on crime and citizenship following the *Tsakouridis* case through punishment theory. The latter ruling has been taken as a starting point, since it expresses a clear change in the CJEU's understanding of the relationship between wrongdoings and citizenship rights.

The materials are analysed through the lens of punishment theory. To this end, this article adopts a holistic understanding of punishment, regarded as the reprobationary response whereby the EU reacts to criminal law violations. Therefore, the discussion revolves around the way in which criminal punishment affects rights (be they already acquired or not) that are not inherently curtailed by penal sanctions (such as the right to liberty).

As punishment theories are concerned with the legitimacy of punishment, they can prove to be an important tool to investigate into the foundation of the Court's approach to crime and citizenship rights restriction. Citizenship and punishment in the Union approach are highly interdependent. On the one hand, there is the issue as to whether rights are regarded as *vehicle of*, or *reward for*, integration. On the other, if integration is a prerequisite for acquiring and maintaining rights, the consequences a polity attaches to punishment can change dramatically the position of the citizen.

The Court has traditionally been adamant that curtailing EU citizenship rights for deterrence purposes is incompatible with EU law, and that the impact of wrongdoings on citizenship rights must reflect the blameworthiness of the latter.

The presentation of the *Tsakouridis*,[46] *P. I.*,[47] *Onuekwere*,[48] *M. G.*,[49] *C. S.*[50] and *Rendón Marín*[51] cases reveals a new role for crime in the Union. These rulings regard different situations: *Tsakouridis* and *P. I.* are concerned with expulsion from a Member State to another; *Onuekwere* and *M. G.* raise the question as to whether time spent in prison can be considered for acquiring the right to permanent residence or protection against expulsion in the host Member State; *Rendón Marín* and *C. S.* deal with the expulsion due to criminal convictions, from the Union altogether, of a third-country national having full custody of EU citizens.

Such variance notwithstanding, these judgments are part and parcel of the broader Court's understanding of citizenship. They legitimate the use of criminal law and coercive measures through a model of *probationary citizenship*, which opposes *the* good citizen (the law-abiding one) to *the* bad citizen: the latter is *the* criminal, monolithic category of individual who, as such, is not worth trust and legal protection in the envisaged by the Court. Upon that model, the Court develops a debatable concept of public security, which in turn allows the expulsion of the offender from the host state or – in exceptional circumstances - the *Union* itself, even when minors are involved. Public security is constructed by categorisation of dangerous groups of individuals: terrorist, drug traffickers, child abusers. Where a person is attracted in one of the categories of 'monstrous' individuals identified, s/he turns into a *threat* to *public security* who is to be removed from the territory.

The real value upheld by the Court are not the morals of the *host* society, but the individual obedience to the law.[52] Depicting categories such as *the* criminal and *the* crime, without nuances, is unrealistic and hardly compatible with EU citizenship law (including the traditional approach of the Court). Firstly, placing every crime on the same level means completely ignoring what criminal law comes down to: namely, inflicting punishment (in the holistic sense hereby adopted) depending on the seriousness of the obligation/prohibition violated. Secondly, and relatedly, this abstraction process contradicts the link between rights deprivation and individual assessment clearly established by EU law. Thirdly, and in further contradiction with citizenship law, the role of rights as (also) a tool of integration is completely kept out of sight: not only crimes deny integration, they also preclude any further attempt at achieving it. Fourthly, the impact of these measures on the reintegration of the person concerned is set aside.

They try not to establish values commonality through criminal law. They reinforce an understanding of 'the fundamental status' of Union nationals as permanent temporary hosts, rather that wide EU citizens.

3. Crime and Punishment in EU Citizenship

46 Case C-145/09 *Tsakouridis* [2010] I-11979.

47 Case C-348/09 *P.I.* [2012].

48 Case C-378/12, *Nnamdi Onuekwere v Secretary of State for the Home Department* [2014].

49 Case C-400/12, *Secretary of State for the Home Department v M G.* [2014].

50 Case C-304/14, *Secretary of State for the Home Department v CS*, nyp.

51 Case C-165/14 *Alfredo Rendón Marín v Administración del Estado*, nyp.

52 Whereas scholars have noted the Court's reluctance to rely on moral arguments, others have pointed out an attempt to build on a European public order (at least in some AG's Opinion). See Giulio Itzcovich, 'Constitutional Reasoning in the European Court of Justice', CONREASON Project Working Paper, (2013), 20 onwards, http://papers.ssrn.com/abstract=2228979; F. de Witte, 'Sex, Drugs and EU Law: The Recognition of Moral and Ethical Diversity in EU Law', *Common Market Law Review* 50, no. 6 (2013): 1557 onwards.

3.1. *Retribution and Allocation of Rights in EU Citizenship*

Two levels of discussion are to be kept separately: the broader issue of the impact of criminal behaviour on citizenship rights; the specific case of rights restriction based on *public policy* and *public security*, and the interpretation thereof. The commission of a crime might well lead to denial/restriction/withdrawal of rights, without necessarily resulting in expulsion measures.

However, both areas of analysis show the broader understanding of Union citizenship currently espoused by the CJEU. Historically, the Court has not been prone to passively accept restrictions to free movement posed by Member States merely as consequence of criminal behaviour. Rather, it has looked at the substance of the conduct and the proportionality between the latter and the resulting limitation.

EU law subjects the adoption of coercive measures to the presence of an actual and present *threat*[53] to public policy (understood as a fundamental interest of the society)[54] or - the stricter test of - public security (internal and external security of the state).[55] The existence of previous criminal convictions is relevant insofar as the latter are symptoms of the *threat* as mentioned above.[56] Furthermore, the requirement for individual assessment continues even once the coercive measure has been adopted.[57] These constraints reveal the wariness towards any kinds of automatism and abstraction,[58] with the Court being the vigilant over member states' use of criminal law to restrict citizenship rights.

In a similar way to what happens in other contexts of EU citizenship such as access to social benefits, the new era sees integration as the main character. Treated exclusively as a requirement to citizenship rights, integration is a watershed between models of individuals. What is, in the broader play of the evolutionary nature of EU citizenship, the role for crime and criminals? Thanks to *Dano* and *Alimanovic*, we have familiarised with the *unemployed*. Crime is another important fictitious character in the story told by the Court. Crime is a monolithic category – so, one should say, violation of the law – to which lack of integration is associated. Here yet another character comes into play: the *criminal*. Lack of integration as disobedience to the law then places the perpetual temporary host into the anthropological category of the criminal. The default treatment reserved to the *criminal* is denial of citizenship rights. Since the criminal lacks integration, the only logical inference is taking reintegration out of the picture. There is another group of characters to be introduced. They are those particularly dangerous of *criminals* deserving yet a higher level of abstraction and presumption. *The* drug-dealer, *the* sexual offender, *the* terrorist are *threats* to public security; which threshold, as shown above, supports the adoption of particularly harmful measures.

The following episodes highlight the absence of reintegration from the overall narration. This is a story of felonies, enemies, host and lack of integration. Against that background, there is no space for

53 *Rutili*, para 19.

54 Case C-30/77 *Bouchereau*, [01999] ECR 1977, para 35.

55 Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR 1-4621, para 22.

56 *Bouchereau*, para 28.

57 *Orphanopoulos*, para 82.

58 *Calfa*, paras 27-29.

inclusion and 'collectively dealing with the wrong': the wrongdoers are still their (other states') wrongdoers.

3.2. Shaping Criminal Law through Citizenship

3.2.1. Withdrawing Acquired Rights: The Drug-Dealer

Mr. Tsakouridis was born in Germany in 1978, where he was entitled to unlimited residence in 2001. He was arrested in Greece in 2006 and transferred to Germany, where he was sentenced to six years and six months imprisonment. According to German law, the conviction for certain offences would deprive the person of the right of entry and residence in Germany, the reason why he was delivered an expulsion order on 'imperative grounds of public security'. As known, the Citizenship Directive allows expulsion: on serious grounds of public policy and public security, if the person has the right to permanent residence; on imperative grounds of public security, if the person has resided in the host state for the 10 years preceding the expulsion.

The Court had to answer the question as to what absences from the host Member State during the 10-yeras period prevent that person from enjoying the enhanced protection laid down in that provision. This is a crucial question, as it leads to the decision as to what level of protection to afford the person – serious or imperative grounds, the latter being clearly a much higher threshold to be met. Once decided on that point of law, the Court had to answer on the interpretation of the concept of imperative grounds of public security; and, more specifically, whether that concept could be covered by Mr Tsakouridis' behaviour. On the former issue, the Court found that the forced return of the person to the host state due to the imposition of a custodial penalty and the time spent in prison 'may be taken into account as part of the overall assessment required for determining whether the integrating links previously forged with the host Member State have been broken'.[59]

Integration is - subtly but clearly - introduced as a condition to access enhanced protection against the expulsion. From the 'overall assessment' mentioned by the Court, nothing would lead to conclude that the person had transferred to Greece the centre of his personal interest. The focus become therefore the crime committed by Mr Tsakouridis; namely, dealing in narcotics as part of an organised group. The Court found that that behaviour is a diffuse form of crime with impressive economic and operational resources and frequently with transnational connections, as confirmed by the fact that the EU has adopted a specific legislative instrument.[60]

A balance must be struck between the threat (considering the time of the expulsion decision,[61] the possible penalties and sentences, the involvement in the criminal activity, the risk of reoffending[62]) and the risk of compromising the social rehabilitation of the Union citizen in the State in which he has

59 *Tsakouridis*, para 34.

60 OJ 2004 L 335/9, para 46.

61 See, inter alia, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paras 77 to 79.

62 Case 30/77 *Bouchereau* [1977] ECR 1999, para 29.

become genuinely integrated, which is not only in his interest but also in that of the European Union in general.[63] When balancing these two interests, the national court must take into account the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State.[64]

The judgment helps familiarise with the plot written by the Court in the subsequent chapters on crime and citizenship. Integration is regarded – though incidentally and without detailed discussion – as a requirement to access citizenship rights. What is the role for crime in that assessment? The Court considers this through the lens of EU criminal law and the impressive consequences on social, economical point of view. The existence of a specific EU instrument (Framework Decision 2004/757/JHA) testifies to the importance of fighting a given criminal phenomenon; which, in turn, legitimates the adoption of restrictive measures on public security ground. The second step is a proportionality test *en trompe-l'oœil*. Firstly, the use of the rehabilitation argument is flanked by the introduction of a supra-individual understanding thereof. The example of the FD on the transfer of prisoners shows that a paternalistic approach to rehabilitation in the interest of the public can easily pave the way to significant restriction of the person's rights. Secondly, the Court pays lip service to leaving room to the national judge. One the one hand, the national judge is provided with guidance on factors to be considered for the balance. On the other, and ultimately, that balance involves a crime that the Court explicitly defines – with no nuances whatsoever – as a serious, actual and imminent threat to public security. The Court seems to be leaving the national judge the choice on what level of protection to afford (second or third paragraph of Article 28). In reality, it is saying that protection is afforded on condition of integration, on which hangs a conduct that is covered by serious grounds of public security. The main topics of *Tsakouridis* are taken to a next level in *P. I.* Here, the CJEU completely removes reintegration from the agenda of EU citizenship, and further broadens the concept of public security through legitimation of EU criminal law.

3.2.2. Stretching Public Security: The Rapist

If *Tsakouridis* had seen some tentative references to the need for expulsion not to completely impair reintegration – though with a disturbing twist towards the protection of the public – *P. I.* further shifts the paradigm in the CJEU's approach. Mr P. I.[65] was born in Italy and had lived in Germany since 1987, where he was granted a residence permit. In 2006, he was sentenced to seven years and six months

63 *Tsakouridis*, para 50, citing point 95 of AG's Opinion.

64 Ibid, para 53.

65 L. Azoulai and S. Coutts, 'Restricting Union Citizens' Residence Rights on Grounds of Public Security. Where Union Citizenship and the AFSJ Meet: P.I.'; Kochenov and Pirker, 'Deporting the Citizens within the European Union'.

imprisonment for sexual assault, sexual coercion and rape of a minor. In 2008, he lost the right to enter and reside in Germany, and was delivered an expulsion measure.

On that ground, the Court was asked as to whether the "imperative grounds of public security" cover only threats posed to the internal and external security of the State in terms of the continued existence of the State with its institutions and important public services, the survival of the population, foreign relations and the peaceful co-existence of nations. As known, the Court answered that "it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3) of Directive 2004/38, as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it".

The judgment has been subject to fierce criticism, with scholars highlighting the legal unsoundness of the decision from the perspective of EU citizenship law. In a very accurate assessment, Niamh Shuibhne found that *P.I.* "hands an extraordinary degree of expulsion power (back) to national authorities, [and] [i]t departs from the standard rights broadly/derogations narrowly paradigm that is especially vital in situations of expulsion. The revitalization of punishment-plus-banishment is difficult to square with the objective of rehabilitation, rooted in human dignity and committed to by the States yet it feeds a misplaced expectation that States can always exclude "bad" Union citizens – as if the intended strengthening of protection through the Directive had never happened".

In a decision where the final finding is more extended than – and not hugely connected to – the core of the reasoning, the Court bases the latter entirely on EU criminal law. Firstly, Article 83(1) TFEU considers the sexual exploitation of children as one of the areas of crime in which the EU may enact substantive criminal law.[66] Secondly, the CJEU strengthened its reasoning by mentioning Directive 2011/93/EU on the sexual abuse and exploitation of the children and the particularly high penalties provided therein, which reflects the objective established by primary law.[67]

If in *Tsakouridis* the existence of EU criminal law instruments had been *one* of the criteria to support the presumption that drug trafficking is covered by serious grounds for public security, in *P. I.* it is the only argument used. In one breath, the Court distorts both the use of Articles 28 Citizenship Directive and 83(1) TFEU. As rightly noted by Mitsilegas, the latter provision 'serves as a legal basis circumscribing the competence of the European Union to adopt legislation on criminal offences and sanctions, and not as a legal basis for interpreting exceptions to EU free movement and citizenship

66 *P. I.* judgment, para 25.

67 *Ibidem*, para 26-27. The Courts referred to the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of the children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335/1, 17.12.2011.

rights'.[68] The end result of this transplant is that 'in terms of EU citizenship, it serves to dilute the protection offered by EU law; in terms of EU criminal law, by elevating the enumeration of the conduct listed in Article 83(1) to a ground justifying exceptions to rights granted under EU law, it affirms an uncritical securitised vision of EU criminal law and transforms Article 83(1) TFEU into symbolic criminal law'.[69]

It is true that the Court seems to mitigate its conclusions, by finding that "This examination include the individual propensity to act in the same way in the future, the integration into that State and the extent of his/her links with the country of origin, any material change in the circumstances since the expulsion order was issued".

The reference to the individual propensity is striking, and seems to confirm the CJEU's orientation toward the *enemy* – rather than the Duffian - side of the crime-citizenship spectrum. Reintegration comes into play precisely because there is some acknowledged tendency to re-offend by the person concerned, and the punishment needs to be structured so to reduce the likelihood of recidivism. Here, the individual propensity-test becomes a criterion to distinguish between citizens and enemies. In other words, a way to decide whether or not to continue a dialogue with the individual, or to move on to a strategy based on incapacitation and eradication of the source of disturbance. In the present case, expulsion from the host state.

With reintegration left out of the horizon, *Tsakouridis* and *P. I.* strengthen the redefinition of crime and citizenship by broadening the concept of public security through the identification of dangerous offenders. This process has two main implications. Firstly, it continues the dynamic of abstraction and identification of anthropological categories while significantly reducing the room for individual assessment. We define the permanent host as welcome or not on the basis of his/her capacity for being a threat to the security of the *state* concerned. Secondly, this assessment revolves around a strong connection between citizenship and EU criminal law. Union's competences under Article 83(1) TFEU are laid down through the same method (serious areas of crime constituting security threats), reason why that provision has been referred to as a legal basis for securitised criminalisation. What is more, primary and secondary EU criminal law in *Tsakouridis* and *P. I.* are used to legitimate the adoption of coercive measures under citizenship law. Or, as if one were looking in a mirror, coercive measures under citizenship law are used to strengthen the legitimacy of EU criminal law. The latter becomes an authoritative source to prove the seriousness of conducts capable of resulting in rights restriction.

While the first two chapters of this story focused on two specific characters – the drug dealer and the rapist – next episode broadens our horizon, and introduces us another protagonist of this saga: the criminal.

68 Mitsilegas, *EU Criminal Law after Lisbon* (Hart Publishing, 2016), 232-233.

69 Ibid.

3.2.3. Citizenship Rights and Criminal conducts: The Emergence of The *Criminal*

While *Onuekwere* and *M. G.* apparently cover different points of law to those of *Tsakouridis* and *P. I.*, they can be regarded as part of the same picture. As known, acquisition of permanent residence and enhanced protection against expulsion (allowing expulsion only on imperative grounds of public security) require five, and ten, years of residence in the host state, respectively.

Onuekwere regarded a third-country national who applied for permanent residence in the UK, while being repeatedly jailed during the five-year period provided for in the Citizenship Directive. *M. G.* concerned a Portuguese national who had been living in the UK for over 10 years, before being imprisoned after conviction, and delivered an expulsion order on serious grounds of public security.

These cases brought anew to the fore the uneasy relationship between crime, time and (legal) residence in EU citizenship. Can time in prison be taken into account as 'qualified' time to access permanent residence (*Onuewkere*) or enhanced protection (*M. G.*)? Does that time erase the precedent 'good' period of residence, so requiring the integration clock to start ticking again from scratch?

The CJEU spells out what had been only hinted at in previous judgments. Firstly, the Court regarded integration as a precondition of the acquisition of the right to permanent residence and enhanced protection, based on territorial, temporal and qualitative elements.[70] A prison sentence ensues from a violation, by the person concerned, of Member States' criminal law, which in turn enshrines the societal values of that state.[71] Thus, a conviction is in denial of genuine integration, and granting citizenship rights in spite of that circumstance would run counter to the aim of the Directive. If these rights require integration, the latter in turn is achieved through continuity of legal residence.[72] However, the intrinsic incompatibility between detention and integration means that prison time interrupts the continuity of residence,[73] so precluding the access to citizenship rights.

For someone that commits a crime and goes to prison, the integration clock stops ticking, and starts again when – maybe – the person is set at free.[74] In *M. G.*, the CJEU tentatively mitigated its harsh conclusions by stating that "the fact that the person concerned has resided in the host Member State during the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment for determining whether the enhanced protection will be granted".[75]

The judgments strike for different reasons. After reinforcing the understanding of integration in EU citizenship as a requirement rather than objective, they generalise the equation between criminal behaviour and disregard for societal values. We are no longer dealing with specific categories of wrongdoer, such as the drug dealer or the rapist, but with *the* criminal *tout court*. The rulings seem to completely ignore the distinction between *mala in se* and *mala quia probihita*, according to which there

70 Court's judgment, para 24.

71 *Ibidem,* para 26.

72 *Ibidem*, para 30.

73 *Ibidem*, para 32.

74 *M. G.* judgment, para 28-33.

75 *Ibidem*, paras 34-37.

are – plenty of – offences that are quasi-administrative, precautionary in nature and very tenuously value-based. What is more, they reinforce a disturbing legal fictions based on two, inextricably linked, centrepieces: the sharp contrast between anthropological categories – *the* citizen v *the* criminal – and the denial of a proportionality test. This confirms the growing distance of the current CJEU's approach from a Duffian understanding of punishment, and strengthens the use of EU citizenship as means to legitimate EU (criminal) law.

When asked about the possibility of leaving some room to the national judge – as advocated by Germany and the Commission – the AG denied such a possibility: offences and penalties vary significantly throughout the Union, and 'it is for the European Union legislature to define the criteria on the basis of which and the thresholds within which it should be considered that a period of residence in prison does not interrupt residence".[76] This argument - tacitly agreed with by the Court – adds *centralisation* of the relationship between crime and EU citizenship to the *self-legitimation* emerging from previous judgments. Not only the presence of existing primary and secondary EU criminal law is a valid – in *P. I.*, the only – argument justifying incredibly serious restrictions of citizenship rights. It is for EU law to harmonise the conditions on which crime – and in particular prison time - can curb those rights.

In balancing rehabilitation and retributive functions of custodial penalties, the AG in *Onuekwere* found that clearly 'the sentence also serves the essential purpose of retribution', and 'rehabilitative function cannot result in a situation where a period spent atoning for the crime committed confers on the convicted person a right the acquisition of which requires recognition and acceptance of social values which he specifically disregarded by committing his criminal act'.[77] Rehabilitation follows the imposition of a sentence, which in turn denies integration.

It may seem only fair that no one shall be rewarded for committing a crime. If the person cannot acquire new rights because of imprisonment, however, what about rights already acquired? The answer given in *M. G.* is clear: any crime can result in denying integration link, and so in the withdrawal of rights (potentially) enjoyed by the person. One may object that this is reserved to those rights requiring acceptance of social value. If this is the case, the question spontaneously arises: where do we draw the line between rights that require acceptance of social values of those that do not?

If crime and punishment stand in the way of further rights, and deprive the person of a (potentially) extremely broad range of rights already acquired, rehabilitation is required to work on a person with an extremely impoverished personal legal status. The likelihood of success, then, becomes very limited.

In the last (for the moment) chapter of this story, the figures of the criminal and the EU national do not coincide. In *Rendón Marín* and C. S., the former (third-country national) has full custody of minor Union citizens.

76 *Onuekwere*, AG's Opinion, para 72.

77 Ibid, paras 54-55.

3.2.4. Enjoying the Substance of Citizenship? Continuity beyond the Appearance

Rendón Marín and *C. S.* regarded the possible expulsion from the Union of third-country nationals, having full custody of minor Union citizens. In *Rendón Marín*, the coercive measure would ensue from the person concerned being illegally staying in Spain, as he was refused the right to reside therein. This refusal was based on Spanish law, which automatically excludes the right to residence to those who have criminal record. As for *C. S.*, the UK law provides that third-country nationals convicted for a criminal offence of a certain gravity (in this case, one year imprisonment) are automatically liable to deportation. The children would be subject to expulsion as well, as they are not autonomous.

In both cases, the Court found that an expulsion could be compatible with EU law. However, that measure could not result solely from the criminal record of the person concerned. Articles 27 and 28 of the Citizenship Directive make clear that the personal conduct of the individual concerned must represent a genuine and present threat affecting one of the fundamental interests of society or of the Member State concerned.[78] Therefore, an expulsion measure situations like those at stake has to be based on a specific assessment by the national court of all the current and relevant circumstances of the case,[79] in the light of the principle of proportionality, of the child's best interests[80] and of the fundamental rights whose observance the Court ensures.[81]

The Court's rulings *Rendón Marín* and *C. S.* seems to mitigate the harsh stance taken in the previous decisions analysed above. This could be surely explained, amongst other factors, by the specific circumstances of the cases. Unlike other judgments, the refusal of the right to residence and protection against expulsion as consequence of criminal convictions could have led the persons concerned – and the Union citizens of whom the TCNs are fully in charge - to be deported outside the EU.

On a closer look, the judgment shows a significant degree of continuity with the previous chapters of the saga. This can be seen specifically in the way the CJEU reconstructs the concept of public security. While declaring the need to interpret it narrowly, the Court confirms its previous, very debatable case-law. By endorsing an understanding of public security built around the identification of dangerous categories of individual – the drug trafficker,[82] the rapist, the terrorist[83] – the CJEU brings even closer EU citizenship, and primary and secondary EU criminal law.

The next section discusses the appropriateness, such differences notwithstanding, of jointly reading this case-law, where the Court adopted a reward-based approach to citizenship rights, conferred according to the divide between law-abiding citizens and threatening individuals.

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78 The Court has pointed out that the condition relating to the existence of a present threat must, in principle, be fulfilled at the time when the measure at issue is adopted. See, inter alia, Case C-30/77 *Bouchereau*, [01999] ECR 1977, para 28), and that justifications on grounds of a general preventive nature and ordered for the purpose of deterring other foreign nationals cannot be accepted. See to that effect Case C‑33/07, *Jipa* [2008] ECR I-05157, paras 23 and 24; Case C‑441/02, *Commission v Germany* [2006] ECR I-03449, para 93.

79 The personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society.

80 The CJEU made reference in particular to his age, his situation in the Member State concerned and the extent to which he is dependent on the parent. See *Jeunesse v. the Netherlands*, ECtHR judgment of 3 October 2014, app. No. 12738/10, para 118.

81 In particular, the Court referred to the right to respect for private and family life, as laid down in Article 7 of the Charter. See, to this effect *Tsakouridis*, *para* 52.

82 *Tsakouridis*, paras 45 and 46.

83 Case C‑100/01*Oteiza Olazabal* [2002] ECR I-10981, paras 12 and 35.

At first sight, the Court's approach might express an attempt at establishing commonality of values within the EU through criminal law. However, values might be means to the end of legitimating the use of EU criminal law. The Court turns upside down EU citizenship law, by counter-posing abstract anthropological models – the loyal citizen *v* the criminal – and using those models to reinvent the concept of public security.

3.3. Criminals or Citizens?

EU citizenship law – and Directive 2004/38/EC in particular – explicitly aim at promoting integration of citizens throughout the Union. The objective is achieved – also – by anchoring the adoption of potentially detrimental measures to a strict and individual assessment, based on the existence of an actual and present threat. Such a test is required by both *public policy* and *public security* exceptions. These concepts, in the traditional Court's approach and the Citizenship Directive, are clearly kept separately, with public security requiring a much higher threshold to be met. This is especially the case when it comes to persons having legally resided in the host state for many years prior to the measure in question.

The cases discussed above are difficult to square with such a legal framework, and mark a shift of paradigm in the Court's approach to the relationship between crime and citizenship. What is more, they form part of a broader trend in EU citizenship. The Court tend increasingly to identify and oppose anthropological models of individuals divided by the line of the integration requirement. Once *the* crime becomes the watershed, the anthropological mutation – which amounts to a radical change of one's legal status - from *the* law-abiding to *the* criminal is easy.

The Court outlines and consolidates a model of probationary citizenship where rights – including the right not to be subject to coercive measures – are regarded as a reward. This approach rests on two, contrasting models of human being, and is underpinned by a never-ending expanding interpretation of public security. The departure from the individual assessment test starts with the depiction of one, monolithic figure of criminal, and continues through the construction of a concept of *public security* that now: incorporates that of *public policy*, so significantly watering down the different levels of protection laid down by the Directive; is construed through the identification of categories of threats.

This process of abstraction is explicitly upheld by the AG in *Onuekwere*, where the possibility for a proportionality test at national level is sacrificed to the altar of the autonomy of the EU legislature. Once a person has committed a crime, s/he is attracted into a group where integration disappears from the horizon of the Directive's objective, and only acts as a requirement for granting rights. Admittedly, *Onuekwere* – the case where *the criminal* clearly emerged – focussed on the calculation of prison time for acquiring permanent residence, and not on the adoption of coercive measures. However, that approach was confirmed in a case that did concern expulsion, such as *M. G.* Furthermore, the rulings show that the denial of the *right of residence*, both at national and Union level, may well lead to *expulsion measures*, so that the two issues cannot be dissociated.

Consistently with recent case-law in other areas of EU citizenship (social assistance), one of the arguments used by the Court is that the Directive requires *legal* residence for achieving the rights at stake. Such legality would be denied by the commission of a crime. The reasoning is particularly problematic. With the strongly residence-based framework of EU citizenship law in mind, if we accept an equation between criminal behaviour and illegality of residence – and the further consequences stemming from that presumption - what might be questioned is the prohibition to ground restrictive measures merely on criminal record. For the time being, such a possibility has been ruled out by the Court in *Rendón Marín* and *C. S.* However, as explained below, the factual background from which the cases arose – and their immediate follow-up - seems not to allow for reassuring conclusions.

Equally controversial is the capacity of criminal record to trigger the notion of *threat*. While the traditional approach is that the mere presence of the former should not be able to activate the latter – although, as shown, such a rule might not be as rock solid as it used to be – it is not clear whether a threat may be seen even without a criminal conviction. This is one of the key features of the enemy criminal law: 'When a past act is punished […] one is still communicating with the criminal […] when it comes to the prevention of future acts, it is more a question of isolation'.[84] The possibility of a disconnection between crime and threat emerges even from the classic case-law of the CJEU,[85] and was confirmed by the New Settlement for the UK in the EU more recently.[86]

The new wave of the Court's approach to crime and citizenship, heavily relying on presumptions and ideal types, seems to espouse the refuse to engage in any sort of 'dialogue' with *the* criminal. On the basis of such presumption the Court seem to overlook the detrimental effects that these measures could have on the rehabilitation of the person concerned: you cannot achieve reintegration without integration first – denied per se by any criminal conduct. The tentative references to reintegration not only reveal the belief that wrongdoers are mostly a problem of their state of nationality – which somehow contradicts the very spirit of EU citizenship and the creation of the Union as a borderless area. Also, those references rest on an understanding of reintegration that – consistently with the EU law-wide approach – is mainly oriented to the protection of the public rather than individual rehabilitation.

On the one hand, the Court is powerfully affirming a logic of the earned rights, allocated according to the level of faithfulness to the law. On the other, and as a typical feature of a probationary citizenship, such a status is used as a mean to reaffirm national security.[87] Contrasting the law-abiding citizen to the criminal is accompanied by the demands for protection of the former class of individuals and the public more in general, as well as by war declarations against serious areas of crime (most commonly drugs, sexual offenses, and terrorism). A strong link emerges from these cases and EU criminal law. The

84 G. Jakobs, 'On the Theory of Enemy Criminal Law', in M Dubber, eds, *Foundational Texts in Modern Criminal Law* (Oxford: Oxford University Press, 2014), 421.

85 'It is possible that past conduct alone may constitute […] a threat to the requirements of public policy', *Bouchereau*, para 29.

86 Under the heading *Interpretation of Current EU Rules*, it is stated that in determining whether the conduct of an individual poses a present threat to public policy or security, the threat may not always need to be imminent, and Member States may act on preventative grounds even in the absence of a previous criminal conviction. *A New Settlement for the United Kingdom in the European Union*, OJ C 69 I/5, 23.2.2016.

87 Lucia Zedner, 'Security, the State, and the Citizen: The Changing Architecture of Crime Control', *New Criminal Law Review* 13, no. 2 (2010): 379–403.

'serious areas of crime' approach is present in the Union law and policy,[88] where institutional documents and law refer to the need for fighting specifically identified major crime threats.[89] This interaction is embodied by the Court's use of Article 83(1) TFEU. The legal basis for the Union exercise of competences in substantive criminal law – and secondary law instrument adopted pursuant to that provision – is an authoritative argument to legitimate the adoption of rights restriction. Or, from a different angle, citizenship rules on rights restrictions are used to legitimate EU criminal law – and EU competences more in general. Such dynamic finds mature completion in *Onuekwere*, where the AG refused the proportionality test, as it is for the Union legislature to determine the relationship between crime and citizenship. This argument comes with a caveat. This legitimation process does not imply the will to build a true Union approach: the FD on the transfer of prisoner shows that in this area EU law measures can be – and are – adopted with the states' security interests in mind.

It is true that the *Rendón Marín* and *C. S.* judgments seem to set a very high threshold for expelling the persons concerned from the EU as a consequence of criminal convictions. However, the Court has not abandoned an understanding of public policy and public security that, apart from keeping the boundaries between these two concepts rather blurred, is constructed through the categorisation of major categories of dangerous individuals. Terrorists, drug traffickers, child abusers are threats to state security. They are individuals worth being excluded from the community (be it the state or the Union).

Admittedly, *Rendón Marín* and *C. S.* should be distinguished by *Tsakouridis*, *P.I.*, *Onuekwere* and *M. G.* in that they: constitute examples of *static* cases - like *Ruiz Zambrano*, there is no cross-border element at play; would imply expulsion from the Union altogether of EU citizens for acts they have not committed.

The Court might have been adopted a stance more leaning towards the protection of individual rights, by almost completely setting aside the possibility of expulsion merely on the basis of criminal record.

However, the rulings, in one breath, state the need for a restrictive interpretation of *public policy* and *public security*, and confirm (especially in *C. S.*) the broader understanding of those concepts – established through the judgments discussed above. In the current EU law approach the criminal, there is always room for measures aimed to eradicating sources of disturbances.

The use of a Union territory-based argument should not be mistaken for an allusion to a form of value commonality in Europe. The Court is simply establishing a higher threshold for an undeniably more harmful situation: the expulsion from the EU involving minor Union citizens who are atoning for someone else's misbehaviour.

The *threats* in these cases are only the bearers of derived rights, even though the fate of the primary beneficiaries (the children) and the derived ones (the enemies) are inextricably linked. Allowing for an outcome such as that of the *infra*-EU case-law would have meant extending the good citizen test to

88 Take, for instance, Framework Decisions (FDs) 2008/909/JHA, 2008/947/JHA, 2008/909/JHA and 2008/947/JHA.

89 Article 83(1) TFEU allows for appoximation of definition of offences and levels of penalties in a number of areas of serious with a cross-border dimension.

persons who have: entitlement to a higher standard of protection, as are Union citizens compared to non-EU family members; not been involved in any cross-border situations, with the consequences that they would be under scrutiny in their own state.

The CJEU, when referring to values, mostly refers to the values of the *host Member State*. The overriding concern hereby addressed is the state power to get rid of the deviant, independently of his/her status of EU citizen. To this end, there is no clue in the Court's words of the dealing 'collectively with the wrong', the preserving - rather than denying - the offender's civic standing. The wrongdoers are not 'our wrongdoers', but sources of disturbance that have to be done away with.

Member States are granted significant leeway, in order to physically remove a dangerous individual from *their national communities*. *Rendón Marín* and *C. S.* stated that, when minor EU citizens are involved, the person fully in charge of their custody can be expelled from the Union only in exceptional circumstances. Therefore, states do can expel EU citizens from the Union whenever the crimes covered by the Court's case-law are at stake.

4. Concluding Remarks

EU citizenship law has been built on the right, for Member States' nationals, to move and reside freely across the Union. These freedoms – and other, associated substantive rights - are balanced, in primary and secondary law, by *limits* and *conditions*. While the reach and nature of these limits and conditions have not been always crystal-clear, a trend has emerged over recent years where criminal conducts are key to both these concepts.

Starting with the *Tsakouridis* judgment, the Court seems to have drawn a line between a prior approach to crime and citizenship rights, more favourable to the person concerned, to a subsequent, restrictive and (apparently) value-based one. To analyse and locate the CJEU's approach, the article has used a crime-citizenship spectrum at which ends Duff's, and Jakobs', accounts of punishment – hereby understood in its broader sense - have been placed. On the one hand, the Duff's approach advocates for a criminal law built upon an inclusive understanding of community and citizenship, and includes reformation of the wrongdoer in the purposes of punishment. On the other, Jakobs' theory distinguishes between the citizen and the enemy: while the former is still in a dialogue with the community and 'deserves' the application of ordinary criminal law, the latter is a threatening individual (not a person recognised by the legal order anymore) requiring pure incapacitation.

While this research does equate the Court's stance with the criminal of the enemy, it showed that the CJEU's approach: is built upon a strong presumptive mechanism, critically embodied by the dichotomy *citizen-criminal*; disregards the detrimental effect of the measures at stake on the reintegration of the person concerned, while espousing a logic where *public security* demands are the polar star; for the foregoing reasons, blatantly contradicts EU citizenship law, both as positivized and traditionally interpreted by the Luxembourg judges.

Upon understanding integration as a *condition* for acquisition of rights, crime as such would deny that condition: violations of criminal law would amount to disregard for the societal values of the host Member State, and stand in the way of granting rights to the wrongdoers. In most cases, such an interpretation has been underpinned by equating the criminal to a threat to public security. These rulings might appear as expression of a communitarian approach to criminal law: the morals-centred argumentative pattern used by the Court would serve the purpose of strengthening citizenship through criminal law.

Fascinating as the idea can be, this article has argued that the EU is developing a model of probationary citizenship, where obedience and loyalty to the law are a key criterion to distinguishing between the *good* and the *bad* citizen, and to allocating rights according to that distinction. The opposition of the law-abiding citizen against *the* criminal materialises in the judgements discussed above. However, the saga on crime and rights should be read in the context of the broader Court's shift on EU citizenship. The case-law on equal access to social benefits shows that the unemployed without sufficient resources is potentially liable to coercive measures as well, since his/her non-compliance with the conditions laid down in the Citizenship Directive deprives him/her of the right to reside in the host state.

In the Court's case-law, the main concern seems to be the protection of the former category – embodied by a broad interpretation of the concept of *public security*, often merged with that of public policy – from the latter, by mainly construing the wrongdoer as a threat.

The rulings analysed in this research cover a broad spectrum of situations: *Tsakouridis* and *P. I.* concern protection against expulsion of an EU citizen *within* the Union; *Onuekwere* and *M. G.* revolve around the possibility to consider prison time for the purposes of acquiring the right to permanent residence and protection against expulsion; *Rendón Marín* and *C. S.* deal with the expulsion of third-country nationals having full custody of minor, non-autonomous EU citizens from the Union altogether.

Such differences should not however be overestimated. Each of these decisions is part and parcel of a broader, coherent picture that is the current state of the art of the relationship between crime and citizenship rights in EU law. Firstly, the Court establishes an automatism between crime and rights denial, on the basis of the monolithic categories of *the crime* and *the criminal*. This move is explicit in *Onuekwere* and *M. G.*

Secondly, and building upon that, an ever-expanding concept of public security is crafted through the categorisation of major, threatening individuals: the drug dealer, the terrorist, the child abuser. Thereby, not only the Court is pointing to those groups allowing exceptional, rights-curtailing measures. It is also self-legitimating the EU powers in criminal matters at any levels, taking the shape of: existing primary and secondary law (Articles 83(1) TFEU and instruments against drug trafficking and sexual exploitation of children), as in *Tsakouridis* and *P. I.*; appeal to the Union legislature to decide on the way in which crime can impact on citizenship rights, as the AG did in *Onuekwere*; Court's rulings, crystallising its own approach, as apparent in *Rendón Marín* and *C. S.*

It is true that the outcome of these two judgments was favourable to the persons concerned. However, in its reasoning the CJEU kept upholding its expansive approach to public security (although formally arguing for the need to a strict interpretation thereof). For this reason, the way in which *Rendón Marín* and *C. S.* will deserve special attention.

As an immediate follow-up, the Opinion of the AG in the *Fahimian* case states that 'The term *public security* is referred to in the context of all internal market freedoms, including in Directive 2004/38/EC, which specifies the rules on free movement and on citizenship in the context of free movement, as a ground of justification for a derogation from free movement. Moreover, the Court has recently allowed for a public security exception in the context of the Treaty rules on EU citizenship, by holding in CS *that Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security*'.[90]

At first sight, such a reading of *C. S.* seems to follow the – not very promising – direction depicted in this article, whereby the Court's case-law is used as a tool to confirm, rather than restrict, state coercive powers.

90 Case C-544/15, *Sahar Fahimian v Federal Republic of Germany*, Opinion of the Advocate General, para 51.